

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Petition of the)	
Town of Topsail, North Carolina)	
)	CSR-6403-E
For Recertification to Regulate the Basic Cable)	
Service Rates of Charter Communications, Inc.,)	
d/b/a/ Falcon Cable Media)	

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 2010

Released: May 7, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On October 25, 2004, the Town of Topsail, North Carolina (the “Town”), filed with the Commission a Petition for Recertification (“Petition”), pursuant to Section 623(a)(3) of the Communications Act of 1934, as amended (“Communications Act”),¹ and Section 76.916 of the Commission’s rules,² to regulate the rates for basic cable service of Charter Communications, Inc., d/b/a Falcon Cable Media (“Charter”), in Topsail, North Carolina. The Town’s Petition alleges that Charter is no longer subject to effective competition under Section 623(l)(1)(B) of the Communications Act³ and seeks recertification to regulate Charter’s basic rates. The Town bases its allegation on recent data showing a low percentage of homes in the Town subscribing to Charter’s competitors in multichannel video programming distribution (“MVPD”). Charter filed a Response to Petition for Recertification (“Response”) on October 21, 2004, stating that Charter did not object to the Town’s recertification.⁴ The Town filed a Reply to Response on October 29, 2004.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l)(1) of the Communications Act⁶ and Section 76.905 of the Commission’s rules.⁷ A cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that it does exist in its franchise area.⁸ Once the presence of effective competition has been established, the local franchising authority is no

¹ 47 U.S.C. § 543(a)(3).

² 47 C.F.R. § 76.916.

³ 47 U.S.C. § 543(l)(1)(B).

⁴ Response at 1.

⁵ 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.906.

⁶ 47 U.S.C. § 543(l)(1).

⁷ 47 C.F.R. § 76.905.

⁸ See 47 C.F.R. §§ 76.907(b).

longer authorized to regulate the basic service rates of the cable operator.⁹ A local franchising authority may petition the Commission for recertification pursuant to Section 76.916 of the Commission's rules¹⁰ by demonstrating that: (1) it meets the requirements of Section 623(a)(3) of the Act;¹¹ (2) the cable system for which it seeks recertification is not subject to effective competition; and (3) the reasons underlying the earlier certification revocation are no longer valid.¹²

3. In 2004, we found that Charter was subject to effective competition in the Town under the “competing provider” test for effective competition.¹³ This test requires that (1) a cable operator’s franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (2) that the number of households subscribing to the programming services (the “penetration rate”) of MVPDs other than the largest one exceed 15 percent of the households in the franchise area.¹⁴ Our finding of effective competition in Topsail was based on the presence of two Direct Broadcast Service (DBS) providers, DirecTV and EchoStar, meeting both these requirements. Concerning the second requirement in particular, we found that the two DBS providers had achieved a penetration rate of 22.4%.¹⁵ This percentage was derived from five-digit Zip Code data from 2002.¹⁶

II. DISCUSSION

4. The Town’s Petition uses nine-digit Zip Code, or Zip+4, data from 2004,¹⁷ which are both more precise and more recent than those on which we based our 2004 finding. These data, to which Charter does not object, show a DBS penetration in the Town of 3.57%,¹⁸ which is well below the over 15% minimum to support a finding of competing provider effective competition. Based on the new, objective data supplied by the Town, we conclude that the cable system for which it seeks recertification is not subject to effective competition and that the reasons underlying the earlier certification revocation are clearly no longer valid.

5. The Town’s Manager has declared under penalty of perjury and to the best of his personal knowledge, information, and belief, that the Town has adopted and will continue to administer regulations with respect to rates subject to regulation that are consistent with the regulations prescribed by the Commission; that the Town has the legal authority to adopt, and the personnel to administer, such regulations; and that procedural laws and regulations applicable to rate regulation proceedings by the

⁹ 47 U.S.C. § 543(a)(2).

¹⁰ 47 C.F.R. § 76.916.

¹¹ These requirements are, in brief, that the franchising authority certify in writing to the Commission that (1) it will adopt and administer basic rate regulations that are consistent with those prescribed by the Commission, (2) it has the legal authority to adopt, and the personnel to administer, such regulations, and (3) the franchising authority’s procedural laws and regulations provide a reasonable opportunity for consideration of the views of interested parties. 47 U.S.C. § 543(a)(3).

¹² 47 C.F.R. § 76.916(b). The latter showing must be “clear” and supported by objectively verifiable data or an affidavit. 47 C.F.R. § 76.916(b)(3).

¹³ *Charter Commun., LLC* (“Charter”), 19 FCC Rcd 7003, 7009 (2004).

¹⁴ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

¹⁵ *Charter*, 19 FCC Rcd at 7009.

¹⁶ *Charter*, 19 FCC Rcd at 7006 ¶¶ 6-8; Petition at 1.

¹⁷ Petition at 3.

¹⁸ *Id.* at 3, Exh. 2.

Town provide a reasonable opportunity for consideration of the views of interested parties.¹⁹

6. Based on the foregoing, we conclude that the Town has submitted sufficient evidence to demonstrate that Charter's cable system serving the Town is no longer subject to effective competition and that the Town has satisfied other requirements for it to be recertified to regulate the Charter's rates for basic cable service.

III. ORDERING CLAUSE

7. Accordingly, **IT IS ORDERED** that the petition filed by the Town of Topsail, North Carolina, for recertification **IS GRANTED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁰

FEDERAL COMMUNICATIONS COMMISSION

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¹⁹ *Id.*, Exh. 3.

²⁰ 47 C.F.R. § 0.283.